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In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that federal agencies need not provide the home addresses of employees to their collective bargaining agent because such disclosure intrudes on employees' interest in privacy and does not significantly advance the purposes of the Freedom of Information Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a)[1] is reported at 884 F.2d 1446. The four opinions of the

[1] All Pet. App. references are to the appendix in No. 89-853.

Federal Labor Relations Authority (Pet. App. 38a-91a) are reported at 25 F.L.R.A. 828, 25 F.L.R.A. 560, 24 F.L.R.A. 917, and 24 F.L.R.A. 209.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1989. The petitions for a writ of certiorari were filed on September 14, 1989, October 31, 1989, and November 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Resolution of the question presented—whether federal agencies are required to provide the home addresses of employees in a bargaining unit to the union that represents the unit—requires consideration of three federal statutes. Title VII of the Civil Service Reform Act of 1978 (CSRA), also known as the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, governs collective bargaining in the federal sector. The statute generally provides that a federal agency must provide information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" to the authorized representative of its employees. 5 U.S.C. 7114(b)(4). However, Section 7114(b)(4) requires disclosure only "to the extent not prohibited by law." The Privacy Act of 1974, 5 U.S.C. 552a, is therefore relevant to a request for employees' home addresses, because one of its provisions (5 U.S.C. 552a(b)) "generally prohibits disclosure of personnel information." Pet. App. 10a. There is an exception to the Privacy Act (5 U.S.C. 552a(b)(2)) for information that must be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and therefore FOIA is also per-

tinent to the question presented. While generally requiring disclosure of information in agency files, FOIA excepts from disclosure information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Application of the exception in Section 552(b)(6) "requires a balancing of the harm to the individual whose privacy is breached against the public interest served by disclosure." Pet. App. 10a.

The Federal Labor Relations Authority (FLRA) first considered whether federal agencies must disclose home addresses to unions in *Farmers Home Administration Finance Office,* 19 F.L.R.A. 195 (1985). It held that "the employees' strong privacy interest in their home addresses" outweighed the public interest in disclosure since the union had adequate alternative methods of communicating with members of the bargaining unit. *Id.* at 198. The Second Circuit disagreed with that determination. *AFGE, Local 1760* v. *FLRA,* 786 F.2d 554 (1986). The FLRA then changed its position. It concluded that the "public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses." *Farmers Home Administration Finance Office,* 23 F.L.R.A. 788, 793 (1986).

Three courts of appeals upheld the Authority's revised conclusion and enforced orders requiring federal agencies to disclose the names and addresses of employees. *United States Department of Navy* v. *FLRA,* 840 F.2d 1131 (3d Cir.), cert. dismissed, 109 S. Ct. 632 (1988); *United States Department of the Air Force* v. *FLRA,* 838 F.2d 229 (7th Cir.), cert. dismissed, 109 S. Ct. 632 (1988); and *United States Department of Health and Human Services* v. *FLRA,* 833 F.2d 1129 (4th Cir. 1987), cert. dismissed,

109 S. Ct. 632 (1988). The Eighth Circuit rejected the FLRA's position in part, holding that at least some employees have a sufficient privacy interest in their home addresses such that release would constitute a clearly unwarranted invasion of personal privacy. *United States Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989).

2. The decision of the court of appeals in this case arose out of four cases decided by the FLRA. In three of the cases, a union filed an unfair labor practice charge after a federal agency refused to provide the home addresses of employees in a bargaining unit the union represented. The fourth case arose after a union proposed that the agency agree to provide addresses and the agency refused to negotiate over the proposal. In each of the four cases the FLRA concluded, without deciding whether the union had adequate alternative means of communicating with members of the bargaining unit, that the agency was required to disclose the addresses. Pet. App. 38a-91a.

The court of appeals reversed. Pet. App. 1a-36a. In balancing the privacy interest of the employees against the public interest in disclosure, the court first noted that "entrepreneurs have filed FOIA requests for specific names of classes of current government employees in order to aid them in business solicitation." Pet. App. 13a. It concluded that federal employees have a privacy interest in avoiding an " 'unwanted barrage of mailings and personal solicitations' " from such persons. *Ibid.* (quoting *National Association of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989), and *Minnis* v. *United States Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985)).

The court of appeals further concluded that any interest in disclosure was minimal because the purposes of FOIA—

which "focuses on the citizens' right to be informed about 'what their government is up to' " (*United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468, 1481 (1989))—would not be advanced appreciably by disclosing the home addresses of bargaining unit members. While the court hypothesized that an investigative reporter might use the home addresses of government employees "to ferret out what 'government is up to,' " it concluded that any public interest in the disclosure of employees' addresses was not "enough to outweigh the workers' significant interest in privacy." Pet. App. 13a, 14a.

In reaching its conclusion, the court below noted that each of the contrary decisions of the courts of appeals did not have the benefit of this Court's decision in *Reporters Committee* and "considered the *special* public interest in advancing collective bargaining as an aspect of the disclosure value, and, indeed, as the clinching value." Pet. App. 11a. That approach was erroneous in light of *Reporters Committee*, the court below stated, because in that case "the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—'to ensure that the *Government*'s activities be opened to [the] sharp eye of public scrutiny.' " Pet. App. 11a (quoting 109 S. Ct. at 1482).[2]

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[2] The court of appeals also held that the "routine use" exception to the Privacy Act (5 U.S.C. 552a(b)(3)) does not authorize disclosure. Under that exception—which authorizes the routine disclosure of information in personnel files where an agency has filed a notice in the Federal Register describing the sorts of routine disclosures that will be made (5 U.S.C. 552a(e)(4)(D))—the Office of Personnel Management (OPM) has concluded that agencies may disclose the addresses of bargaining unit members to unions, but only if the union shows that no adequate alternative means exist for contacting the employees. Pet. App. 18a-19a. The unions here had made no such showing. *Id.* at 22a.

gaining may not be taken into account in determining whether addresses should be released to federal sector unions. As she correctly explained in her concurring opinion, "[t]he broad cross-reference in 5 U.S.C. 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act * * *. Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." Pet. App. 24a.[4]

Moreover, even if the union's special interest in obtaining employees' addresses could properly be considered, that interest is hardly weighty. Under OPM's "routine use" regulation (see note 2, *supra*), a union may obtain home addresses where there is no adequate alternative method for it to contact employees. Thus, the special interest that would be relevant here is whatever interest a union with other adequate means of contacting employees has in obtaining their home addresses.[5] And if special interests are

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[4] Judge Ginsburg complained (Pet. 26a-27a) that private sector unions are able to obtain addresses from employers. But public employees are treated differently than private employees in many respects. For example, they are not allowed to strike (5 U.S.C. 7116(b)(7)) and most cannot bargain about wages, which are set by Congress (see 5 U.S.C. 7102(2), 7103(14)). Public employees also enjoy protections—notably those provided by the Bill of Rights—that do not restrict private sector employers. Among those protections is coverage under the Privacy Act, which applies only to public agencies and generally prohibits the distribution of personnel information.

[5] The records before the FLRA showed that the unions had adequate alternative means of contacting employees. In the case of the Social Security Administration, for example, the Union was permitted to use specified bulletin boards; to distribute literature "desk-to-desk";

to be considered, it should be recognized that a union with adequate means of contacting employees will fail to have the home addresses only of those employees who refuse to provide them to the union, presumably because they do not wish to be contacted by the union at home. The claims of those employees to the enjoyment of home and hearth undisturbed by unwanted union intrusions—the right to be left alone, at home if nowhere else—should be honored.[6]

2. Contrary to petitioners' contentions (89-853 Pet. 15-19; 89-566 Pet. 11-14; 89-444 Pet. 6), there is no conflict in the circuits that warrants consideration by this Court. Each of the allegedly contradictory court of appeals decisions predates this Court's decision in *Reporters Committee.* This Court's decision in that case made clear that, where an exception to FOIA's general rule that agency records must be disclosed is applicable, the factors weighing against disclosure must be balanced against the central purpose of FOIA, which is ensuring that "the *Government*'s activities be opened to the sharp eye of

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to hold meetings on off-duty time; to distribute its newsletter four times a year; to use the agency's internal mail system; to use the agency's telephone system; and to be present at new employee orientations. C.A. App. 118; see also Pet. App. 45a-46a, 71a-72a.

[6] Contrary to Judge Ginsburg's suggestion (Pet. App. 28a-29a), neither the Court's decision in *Reporters Committee* nor its application to this case is contrary to the Court's decision in *United States Department of Justice* v. *Tax Analysts,* 109 S. Ct. 2841 (1989). The Court held in *Tax Analysts* that documents in the control of an agency, such as the judicial decisions at issue in that case, are "agency records" under FOIA. Accordingly, an agency may withhold such documents "only if it proves that the documents fall within one of the nine disclosure exceptions set forth in 552(b)." 109 S. Ct. at 2845. In *Tax Analysts* no exception applied. Here, in contrast, the exception for personnel files "the disclosure of which would constitute a clearly

public scrutiny." 109 S. Ct. at 1482. The other courts of appeals should be given an opportunity to reconsider their prior decisions in light of *Reporters Committee.*[7]

Moreover, the FLRA itself should reconsider its prior decisions in light of *Reporters Committee* before this Court considers the matter. Its decisions in this case were all handed down prior to *Reporters Committee.* Thus far, the FLRA has issued no decision explaining how its position is sustainable if the special interest in collective bargaining is not included on the side of the scale favoring disclosure. On reconsideration, it may well change its position again and agree with the court below. In that event, the unions can challenge the decision in the various courts of appeals and attempt to create a conflict in the circuits. If a conflict emerges, review may be warranted, but it is not warranted now.[8]

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unwarranted invasion of personal privacy" *does* apply. The applicability of an exception cancels the statutory mandate of disclosure of agency records and requires consideration of whether disclosure would promote the purposes of FOIA.

[7] The FLRA notes (Pet. 16 n.12) that the Seventh Circuit in the *Air Force* case did not rely on the union's collective bargaining interest, but held that employees' home addresses are generally available under FOIA. That conclusion cannot endure after *Reporters Committee,* since the Seventh Circuit identified no purpose relating to "what the[ ] government is up to" (109 S. Ct. at 1481) that would be furthered by the disclosure of employees' addresses. It simply concluded that "[t]here are legitimate uses for home addresses; the Union proposes one such use." 838 F.2d at 233.

[8] The FLRA suggests (Pet. 17) that a conflict cannot emerge if it does not change its position because federal agencies may challenge any of its decisions in the District of Columbia Circuit under 5 U.S.C. 7123(a). However, the FLRA is authorized by 5 U.S.C. 7123(b) to enforce its orders in any appropriate court of appeals, which would include courts other than the D.C. Circuit in cases arising outside the District. We are aware of no authority preventing it from filing an enforcement action in another court of appeals as soon as it hands down an order.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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